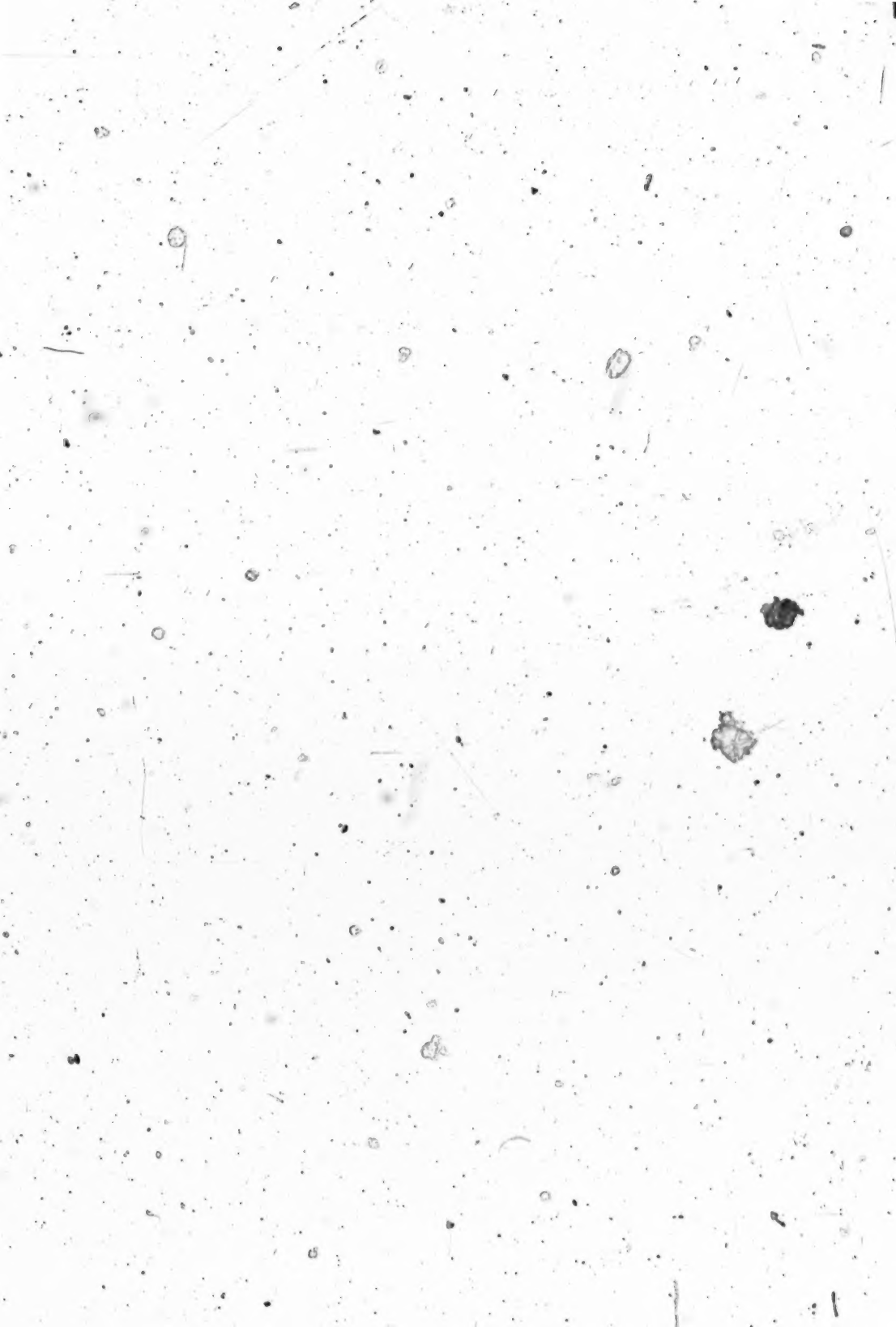

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 901

ALFRED G. SECKLER, Trustee in Bankruptcy,
Petitioner,

vs.

J. I. CASE COMPANY, a corporation,
Respondent.

In the Matter of
LELAND WADE MORRISON, Bankrupt

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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Statutes Involved

"Every chattel mortgage shall be good and valid between the parties hereto until the indebtedness secured thereby is paid or barred by the statute of limitations." Colorado Revised Statutes 1953, Sec. 20-1-4.

"Except as otherwise provided for by law, no mortgage on personal property shall be valid against the rights and interests of any third person unless possession of such property be delivered to and remain with the mortgagee or the mortgage be filed or recorded as provided for in this article." Colorado Revised Statutes 1953, Sec. 20-1-1.

Question Presented

Whether by virtue of Section 70(c) of the Bankruptcy Act a Trustee in Bankruptcy has title and the right of possession to goods repossessed by a creditor prior to the date of bankruptcy pursuant to the terms of title retention agreements entered into more than four months prior to the date of bankruptcy.

The statement of the Question Presented as set forth in the Petition, on p. 2, is inaccurate. It is acknowledged that Section 70(c) of the Bankruptcy Act gives the Trustee the position of a lien creditor at the date of bankruptcy. All that the Supreme Court of Colorado determined was that *under the facts in this case* the Trustee, being a lien creditor at the date of bankruptcy, could not assert title and the right of possession to goods legally repossessed by a creditor prior to the date of bankruptcy.

Facts

The facts in this case, as determined and set forth by the Supreme Court of the State of Colorado, are:

> "Plaintiff J. I. Case Company, a Wisconsin corporation qualified to do business in Colorado, is a manufacturer of farming machinery and equipment. For several years prior to September, 1956, one Morrison was its dealer in the City of Sterling, Colorado. The arrangement between the company and Morrison was based upon a dealer's contract, under the terms of which Case delivered items of machinery, parts and equipment to Morrison on his order, retaining the title thereto until sold and the invoice price remitted to the Company. It provides that in the event any indebtedness of the dealer to the company is not paid when due, or upon failure to comply with any of the terms or conditions of the contract, the company shall be entitled to the immediate possession of all property delivered under the contract and remaining unsold and

for which the company had not received payment in full.

On March 8, 1956, Morrison was indebted to the Company in excess of $9,000.00 and on that day executed a note and chattel mortgage to the company covering the items of machinery, implements and parts then on hand. On September 24, 1956, Morrison was advised in writing that his dealer's contract was cancelled as of that date and that the company would proceed to take possession of all machinery, implements and other property then on hand in accordance with the terms of the contract. This it proceeded to do the following day with the assistance, or at least acquiescence, of Morrison. *The property was removed from Morrison's establishment to a lot some distance away which the company had rented for that purpose. Not all the property then on hand was removed, and that which remained on the Morrison premises is not involved in this action.* On September 28, 1956, in a civil action brought by one Crow, defendant Seckler was appointed receiver of Morrison's business and made claim to the property that Case had removed from the premises. He posted a notice on the gateway of the lot to which it had been removed, to the effect that it was in his possession as receiver and nothing should be removed.

Following this action of Seckler, Case brought the present action in replevin against Seckler as defendant, claiming ownership and the right to possession of the property involved. Writ of replevin was issued and the sheriff, according to his return, assumed custody of the property. On October 11th following, Morrison was adjudicated a bankrupt on his voluntary petition and defendant Seckler was appointed trustee of the bankrupt's estate and as such intervened and filed an answer in this action. He denied the right of Case to possession of the property. Other than the trustee in bankruptcy, no rights or claims of any third party are involved.

Upon trial the court found and ruled that the prop-

erty described in the complaint was in the actual physical possession of Case prior to any claim being asserted thereto by Seckler as receiver, or as trustee in bankruptcy; that it was immaterial whether the plaintiff took possession of the property under the terms of the dealer's contract or under the chattel mortgage given on March 8th, and that the question of voidable preference under the bankruptcy act was not an issue in the case under either the pleadings or the evidence." (Emphasis added). Appendix I, Petitioner's Petition and Brief, pp. 11-13.

Argument

At the outset it should be emphasized that this petition for writ of certiorari raises only a very narrow question. There is no claim that a voidable preference was committed or suffered by the bankrupt. In fact, the Supreme Court of Colorado specifically found:

> ". . . the question of voidable preference under the bankruptcy act was not an issue in the case either under the pleadings or the evidence."

Moreover, there is no claim that a fraudulent transfer was involved which could be set aside by the trustee.

The sole issue presented is whether the trustee under Section 70(c), (11 U.S.C.A. sec. 110(c)), has title to goods lawfully repossessed prior to the date of bankruptcy by reason of default pursuant to the terms of title retention agreements entered into between the bankrupt, Morrison, and the creditor, J. I. Case Company. The Supreme Court of Colorado correctly decided that even under the superior title of the trustee under Section 70(c), there was ". . . (N)o third person . . . claiming to have acquired rights . . . and (Morrison's) possession and apparent ownership having evaporated . . ." prior to the date of bankruptcy, the trustee had, under these facts, no greater rights than the bankrupt. On the date of bankruptcy, no creditor of the bankrupt could have obtained a lien on the goods in the possession of J. I. Case Company. Accordingly, the trustee in bankruptcy cannot reclaim possession of the goods, since no execution or lien creditor of the bankrupt could do so on the date of bankruptcy.

The decision of the Supreme Court of Colorado in this matter was consistent with its prior decisions in

Bogdon v. *Fort*, 75 Colo. 231, 225 Pac. 247 (1924); and

McClain v. *Saranac Mach. Co.*, 94 Colo. 145, 28 P(2d) 1009 (1934),

which held that a mortgagee in possession prior to the appointment of a receiver or the date of bankruptcy will (absent a voidable preference or a fraudulent transfer, neither of which is alleged in the case at bar) prevail over the trustee in bankruptcy.

The decision of the Supreme Court of Colorado in this matter is also consistent with the general rule prevailing in all jurisdictions. As is stated in Collier Bankruptcy Manual (2d Ed.), at p. 997:

> "It must be remembered that, generally speaking, . . . taking possession prior to bankruptcy will serve to cut off any rights the trustee may have under Sec. 70(c), . . .",

and, at p. 998:

> "Repossession by the vendor will, in many states, be a full substitute for recording. And, generally speaking, . . . (repossession) effected prior to bankruptcy . . . will operate to defeat the trustee's rights under 70(c)."

The foregoing principles are so well settled that one wonders upon what basis the petitioner here can assert this matter involves "special and important reasons" for the granting of the writ of certiorari. U. S. Sup. Ct. Rule 19.

While the claim is made that the Supreme Court of Colorado's decision in this matter weakens or nullifies the Bankruptcy Act because Colorado law is applied to the facts in order to determine the title of the Trustee, just the opposite result is the reality. The rights of creditors under the Bankruptcy Act are to be determined by first applying the state laws to establish to what degree of perfection the creditor has obtained for his claim. The

Bankruptcy Act is then applied to determine how the creditor—perfected to a certain degree under state law—will fare as against the trustee. The result is that the Bankruptcy Act is applied uniformly on all creditors perfected to the equal degree under varying state laws. Contrary to petitioner's assertion here, the Supreme Court of Colorado did not construe the Bankruptcy Act; it construed the law of Colorado, found that the trustee could not have obtained a lien on the goods repossessed earlier by J. I. Case Company by legal or equitable proceedings on the date of bankruptcy, and therefore found no title in the trustee by virtue of Section 70(c). The result in this case is identical with this Court's decision in *Martin* v. *Commercial National Bank*, 245 U.S. 513, 38 S.Ct. 176 (1918). There this Court said:

> "The Georgia statute imposes the requirement of registration only in favor of a creditor who fixes a lien on the property before recording takes place. Here there is no such person; the trustee occupies the status of one who acquired a lien after that event. No one concerned in the distribution of the estate actually held rights superior to the mortgage while off the record."

Like the law of Georgia, the Colorado Statutes provide that title retention agreements, even though unrecorded, are valid between the parties. Colorado Revised Statutes, 1953, Sec. 20-1-4. Unless possession of property upon which a lien is claimed is in the hands of the mortgagee, only recording of the title retention agreement will protect the interest of the secured party against the subsequent claims of third parties. Colorado Revised Statutes, 1953, Sec. 20-1-1. Obviously, if a secured party repossesses goods upon which a lien is claimed before any third party obtains a lien thereon, repossession cures any lack of record of the claimed lien.

Conclusion

The Petition for Writ of Certiorari does not present a special or important reason for the granting of the Writ. The Supreme Court of Colorado has applied the State law consistent with numerous of its prior decisions, which decisions are also in accord with the decisions of numerous other states. As applied to the facts in this case, it was determined that the Trustee in Bankruptcy could not obtain a lien by legal or equitable proceedings on the date of bankruptcy and accordingly the creditor which had repossessed its goods prior to bankruptcy was entitled to retain them.

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated June 1, 1960.

Respectfully submitted,

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